No. 81-1681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL.

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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TO: The Supreme Court of the United States.

American Insurance Association respectfully moves for an order granting leave to file an amicus curiae brief in the above entitled case pursuant to Rule 42 of the Revised Rules of this Court. Consents of the attorneys for the petitioner and the Federal respondent have been received. Consent of the respondent Hilyer has been refused.

The movant, American Insurance Association (AIA), is an unincorporated trade association of 168 property and casualty insurers. Its members represent a large percentage of the property and casualty industry, particularly in the area of workers' compensation. The most recent figures available demonstrate that in 1980, AIA member companies wrote approximately 50% of the market for workers' compensation insurance. While specific figures are not available, it is estimated that approximately the same percentage of Longshore coverage is written by AIA companies.

The AIA and its member companies are deeply concerned that the ruling of the District of Columbia Circuit Court of Appeals in *Hilyer* will place enormous stress upon all facets of an already overburdened workers' compensation system.

It is the view of the AIA and its members that the practical effect of the *Hilyer* holding will be to defeat the primary purpose of the Act, which is to provide a swift and efficient remedy to injured employees. The AIA, as amicus curiae, seeks to assist the Court by presenting a discussion of the adverse impact of the decision on the efficiency of the Longshore system.

Petitioners and respondents are primarily expected to emphasize the merits of the Court of Appeals' decision vis-a-vis the facts of the instant case and their clients' respective interests, while discussing only peripherally the far reaching implications of the court's ruling. These issues, of utmost importance to the business community and insurance industry, will not adequately be presented by the parties, and it is for this reason that the AIA moves this court for leave to file the attached amicus curiae brief.

The attached amicus curiae brief of the American Insurance Association discusses the design of the Longshore Act, how the decision below injects variables into this design, how such variables are contrary to Congressional intent, and how the decision below simplistically ignores the practical implications of equating "wages" with fringe benefits.

For the foregoing reasons, this motion for leave to file a brief as amicus curiae should be granted.

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Dated: November 18, 1982

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BRIEF FOR AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS

The American Insurance Association (AIA) is an unincorporated trade association of 168 property and casualty insurers. AIA member companies write 50% of *all* workers' compensation insurance in the United States and presumably an equivalent percentage of Longshoremen's and Harbor's Workers' Compensation Act ("LHWCA" or "the Act") coverage.

The AIA and its members are concerned that the impact of the decision below on the insurance industry specifically and the economy generally will be disastrous.

The premium cost to employers for workers' compensation under the LHWCA is already so high that in some cases it may actually threaten to overtake payroll. For example, the compensation premiums in New York are between $84.00 and $87.00 per $100.00 of payroll as compared to as little as $3.00 in some Canadian ports. This quite clearly removes any competitive position the United States ports might have had and has caused an estimated loss of $3,000 – 4,000 jobs as cargo shipments are diverted to Canadian ports. *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S.1182 Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources,* 97th Congress, 1st Session, ("1981 Senate Hearings") pp. 224, 234-235, 1176. The high premiums now existing for LHWCA coverage have already had a substantial impact elsewhere in the economy. For example, it has been estimated that from 1970 to 1976, the District of Columbia lost 108 firms and approximately 15,000 jobs, an estimated loss of $180 million in payroll per year, due in substantial part to already unnecessarily high premiums. 126 Cong. Rec., February 7, 1980 (H 745); Report, Committee on Housing and Economic Development on Bill 3-106, The District of Columbia Workers' Compensation Act of 1979, January 8, 1980, pp. 3, 4. In 1975, 568 private employers were insured by an assigned risk pool, whereas in 1978, the number had grown to 24,000. *Id.,* at 5.

The facts and statistics demonstrating the adverse impact of the LHWCA on American's economy pertain to the facts *before* the decision in this case was rendered. The main reason for the problem has been the uncertainty and variables already in the Act. The decision below adds another variable, one so pervasive and fundamental to the system as to be contrary to the entire design of the Act. The AIA strongly urges reversal in the interest of claimants, Longshore employers, insurers and the American economy, which will otherwise suffer.

SUMMARY OF ARGUMENT

The entire structure of the Longshoremen's and Harbor Workers' Compensation Act is established in order to provide prompt and readily calculable benefits to injured workers not in an attempt to make such workers equitably whole, but to set statutory benefits at a level sufficient to permit the worker to live in a manner generally consistent with his prior level of earnings. The statutory scheme was the result of an historical compromise established to provide a *limited level of benefits promptly* to *all* injured workers.

The approach espoused by the Court of Appeals of attempting to restore to an employee the "value" lost due to an injury nullifies this compromise not only by erasing the limit of liability, but also by so complicating administration under the Act that payment of benefits will be extensively delayed. The Court of Appeals has taken the fundamental foundation of workers' compensation benefits – the definition of "wages" – and grafted upon it a valuation concept comprised of factual issues which will promote and require constant litigation and factfinding. During the entire history of the Act, the administrative treatment of "wages" has been routine and straightforward. The Court of Appeals' inconsistent interpretation of the wage concept will therefore severely interrupt the smooth administrative machinery established by Congress.

The consistent administrative interpretation of the concept of "wages" not only reflects Congressional intent, but has been ratified by later Congressional enactments. Although the Court of Appeals' simplistic adoption of a new approach to wages fails to foreshadow the havoc which will befall the administrative process and the orderly payment of compensation benefits, closer scrutiny clearly indicates that fringe benefits cannot neatly fit into the concept of "wages" as suggested by the Court of Appeals, because they do not conform to the manner in which the Act was structured and has been applied.

ARGUMENT

I. THE DEFINITION OF "WAGES" AND THE AVERAGE WEEKLY WAGE FORMULA WERE DESIGNED TO GENERATE A FINITE STATUTORY REMEDY FIGURE AND *NOT* TO PROVIDE TORT DAMAGES

A. The Societal Problem

The primary intent of Congress in structuring the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 *et seq.*, ("LHWCA" or "the Act") was to create a swift statutory remedy for workers injured in industrial accidents. At common law, the only recourse for injured workers was a suit for damages predicated on the negligence of the employer. Even if negligence could be proven, all common law defenses could be raised by the employer, including contributory negligence, assumption of the risk and negligence of a fellow servant, all of which would preclude any recovery. The worker, on the other hand, if successful, could claim damages which were limited only by the conscience of the jury and the limited reviewing power of the judge. Unfortunately, this system could not accomplish the societal goal of providing financial support to an injured worker when he needed it most, immediately after the injury. The tort remedy was extremely slow. Often, the more severe the injuries, and thus the greater the need, the longer it took to obtain recovery.

In order to accomplish the desired speed and to insure the worker a guaranteed recovery regardless of proof of negligence, a legislative compromise was reached between the competing rights of employers and workers. This court discussed this compromise in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 282 n. 24 (1980) (*"PEPCO"*):

> Workmen's compensation acts are in the nature of compromise or quid pro quo between employer and employee. . . .In return for a fixed schedule of payments and a fixed amount in the event of the

> worker's death, employers are made certain that irrespective of their fault, liability to an injured workman is limited under workmen's compensation. Employees, on the other hand, ordinarily give up the right of suit for damages for personal injuries against employers in return for the certainty of compensation payments as recompense for those injuries. 1 M. Norris, *The Law of Maritime Personal Injuries*, § 55, p. 102 (3d ed 1975).

The "prime purpose" in formulating the Act was to create a "practical and expeditious remedy." *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 476 (1947). The worker bargained for certainty of recovery and speed. In exchange, the worker waived the right to seek unlimited tort damages and agreed to a defined and limited statutory benefit.

This court in construing the Act must therefore be mindful of the fact that the "tort approach" of compensating for actual loss was purposefully rejected by Congress in its legislative manifestation of the compromise. As Professor Larson states in his oft-cited treatise:

> A compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others.

1 Larson, *Workmen's Compensation Law*, § 2.50, p.11.

This Court has previously recognized this important distinction between the tort approach and the worker's compensation remedy:

> While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. On the contrary, they provide employers with definite and lower limits on potential liability than

> would have been applicable in common-law tort actions for damages. None of the categories of disability covered by the LHWCA authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only two-thirds of the actual loss of earnings.

PEPCO, supra, at p. 281.

In response to the societal problem, the historical compromise eliminated the issue of liability, rejected the tort approach to damages, and created a new device tailor-made to provide not damages but a definite statutory remedy capable of producing rapid results.

B. The Congressional Response

The system established by the LHWCA is therefore intended to provide a swift certain statutory remedy, rather than tort damages. To reduce the time lag in receiving benefits to the barest minimum, the procedures created for generating the compensation benefit amount are such as to require simple and mechanical application of a formula to objectively available data.

The first step in the calculation of benefits is to determine what average weekly wages the employee was earning prior to his injury. "Wages" is defined to mean:

> . . . the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13)

With this definition, the average annual earnings are computed using one of the three alternative methods set forth in 33 U.S.C. § 910(a), (b), and (c). The figure obtained using one of these formulas is then divided by fifty-two to yield the average weekly wage. 33 U.S.C. § 910(d) The procedure established by § 910, by virtue of the alternative computation methods, thus contains built in flexibility which is designed to equitably approximate the claimant's average weekly wage. The beauty of the system is that while it is flexible and adaptable it nevertheless utilizes concrete figures and avoids variables in its definition of "wages" and its method of calculation of average weekly wage.

The average weekly wage figure is the foundation of the entire compensation system. Its sole purpose is to set a statutorily defined figure from which all compensation benefits can be calculated. Disability benefits for temporary total or permanent total disability are calculated as 66-2/3 per cent of average weekly wages. 33 U.S.C. § 908(a) and (b). Disability benefits for total or partial loss or loss or use of one or more listed body parts are statutorily defined to be 66-2/3 per cent of average weekly wages payable for the number of weeks set forth in the schedule. 33 U.S.C. §§ 908(c)(1)-(19).

Disability benefits for permanent partial disabilities, other than those listed in the schedule, and benefits for periods of temporary partial disability, are calculated at the rate of 66-2/3 per cent of the difference between a claimant's average weekly wages and his post-injury wage earning capacity. *PEPCO, supra;* 33 U.S.C. § 908(c)(21); 33 U.S.C. § 908(3). The calculation of wage earning capacity for non-scheduled partial disabilities is determined either by an individual's actual post-injury earnings or by fixing a reasonable wage earning capacity based upon the facts of the case. 33 U.S.C. 908(h); *Devillier v. National Steel and Shipbuilding Company,* 10 BRBS 649 (1979). In death cases, survivors' entitlement to compensation benefits range from 20 per cent to 66-2/3 per cent of average weekly wages,

depending upon the nature of the survivor's dependency. 33 U.S.C. § 909(b), (c), (d).

It is clear from the foregoing that every formula for calculating the amount of benefits to which the claimant is entitled relies on the previous computation of average weekly wages. In order to accomplish the primary objective, prompt and certain calculation of benefits, Congress was careful not to inject variables into the wage concept.[1]

Congress' determination to avoid individual variables in favor of definite and readily calculable benefit amounts is evidenced throughout the Act. Congress *could* have allowed benefit amounts to vary by tailoring them to the worker's take-home pay. *Instead,* it assigned the arbitrary approximation of 66-2/3 per cent of gross pay. Congress *could* have allowed benefits to vary by permitting an analysis of the actual value of the loss of any part of the body to the claimant's occupation. *Instead,* it established the rigid schedule of predetermined values. 33 U.S.C. § 908(c)(1)-(19). Congress *could* have allowed benefit levels to vary without limitation depending on income level. *Instead,* it set a specific maximum which prior to the 1972 amendments to the Act was set at $70.00, hardly allowing restoration of "values received."[2] Congress *could* have defined benefits for a surviving a spouse and surviving children based upon calculation of extent of dependency and actual loss of support. *Instead,* Congress chose arbitrary benefit percentages to establish the benefit level for surviving spouse and children, and set an arbitrary two year lump sum benefit figure upon remarriage. Congress *could* have extended death benefits to a surviving spouse of a worker receiving permanent total disability benefits only

[1] The term "wages" as defined in 33 U.S.C. § 902(13) is also crucial to the determination of residual "*wage* earning capacity," 33 U.S.C. § 908(c)(21), (e), and (h)), and maximum and minimum compensation based upon the "national average weekly *wage*." 33 U.S.C. § 906.

[2] Even the current maximum, keyed to the national average weekly wage, does not allow values lost above that amount to be recompensed. 33 U.S.C. § 906(b).

where death was related to the employment injury. *Instead,* Congress chose the more certain and definitive route of extending death benefits to such a spouse without a factual inquiry on causality. Congress *could* have attempted to approximate the expected loss of earnings suffered by a worker by terminating benefits as of the worker's anticipated retirement age, when his earnings would be expected to stop. *Instead,* Congress chose to provide lifetime benefits. In each instance Congress refused to include variables and established specific defined values and mandatory results.

Because the "prime purpose" of the Act is to provide a practical and expeditious remedy, *Cardillo v. Liberty Mutual Insurance Co.,* 330 U.S. 469, 476 (1947) and its "design" in keeping with that purpose is one which encourages "prompt and expeditious adjudication of claims," *Norton v. Warner Co.,* 321 U.S. 565, 568 (1944), Congress scrupulously avoided injecting variables into the scheme of the LHWCA. The circuit courts should not now be permitted to thwart the Congressional purpose by judicially legislating variables into the system.

II. INCLUSION OF FRINGE BENEFITS IN THE DEFINITION OF "WAGES" INJECTS VARIABLES INTO THE ADMINISTRATIVE PROCEDURE

The tort damages concept adopted by the Court of Appeals directly contravenes the Act's purpose of providing a swift and certain remedy to injured workers and will inject factual uncertainty and evidentiary issues requiring administrative action in cases arising under the Act.

A. The Definition of Wages is a Matter Basic to the Act.

Although the case at hand presents the issue of average weekly wages in connection with a death claim, that fact is not material to resolution of the issue, as the statutory provisions pertaining to average weekly wages are just as applicable to

disability claims as they are to death claims. Average weekly wages are used in every worker's compensation case to provide the basis for calculating any resulting period of disability, whether temporary or permanent, total or partial, scheduled or unscheduled and to provide the basis for calculating any death claim.

Parameters in the Act setting maximum and minimum compensation rates are determined with reference to the "national average weekly wage," established annually by the Secretary of Labor. 33 U.S.C. § 906(b). Under the statute, disability benefits may not exceed 200% of national average weekly wages, and may not be less than 50% of national average weekly wages or a claimant's average weekly wages, whichever is less. 33 U.S.C. § 906(b). Death benefits may not be less than the national average weekly wage or the decedent's average weekly wage, whichever is less. *Director, OWCP v. Rasmussen,* 440 U.S. 29 (1979). A claimant receiving permanent total or death benefits is entitled to an annual benefit adjustment determined by the percentage increase in the national average weekly wage. This national figure, as historically calculated by the Secretary of Labor, has *never* included fringe benefit contributions.

Due to the pervasiveness of fringe benefit contributions throughout the work world,[3] the decision below would significantly change the compensation rate calculated from average weekly wages in many cases, and, more importantly, would transform the routine calculation of wages into a subjective skirmish of valuation. In all cases of temporary partial or non-scheduled permanent partial disability, in addition to valuation of pre-injury fringe benefits to establish average weekly wages, a calculation of fringe benefits received post-

[3]The United States Chamber of Commerce has calculated that *voluntary* fringe benefit payments in 1980, exclusive of statutorily required payments, were approximately 28% of payroll. Chamber of Commerce of the United States, *Employee Benefits, 1980,* p. 8 (1981) (1615 H Street, N.W., Washington, D.C. 20062).

injury would also be necessary to determine residual wage earning capacity. In such cases it would be necessary to investigate the relative "value" of fringe benefits before and after the injury to address loss in wage earning capacity. 33 U.S.C. §§ 908(c)(21) and (e); *Devillier v. National Steel Shipbuilding Co., supra.*

In all cases at the maximum or minimum rate, revision of the national average weekly wage to include all fringe benefits would be required and would alter the compensation benefits. 33 U.S.C. § 906. The change in national average weekly wages would have the secondary effect of revising the annual adjustment of persons receiving permanent total disability benefits or death benefits. 33 U.S.C. § 910(f). Inclusion of fringe benefits in the definition of "wages" would therefore be felt on a practical basis at not just one, but frequently two or more stages in workers' compensation cases. To bring national average weekly wages in line with the Court of Appeals' decision below would require either retroactive recalculation of national average weekly wages by the Secretary of Labor, or a mammoth one-year adjustment to introduce fringe benefits and substantially alter the annual modification. 33 U.S.C. §§ 906(b)(3), 910(f)-(h). The opinion below therefore not only would raise numerous issues in pending and future cases but also may require re-activation of numerous dormant or uncontested cases for adjustment on one or more issues.

B . The Reasoning Adopted Below Marks a Fundamental Change in the Concept of Compensation.

The Court of Appeals holding in *Hilyer* expressly requires only that fringe benefit contributions of employers into Taft Hartley trust funds be included in calculation of average weekly wages. In order to reach that conclusion, however, the court followed an approach which, if it is adopted by this Court, suggests the inclusion of numerous other indirect fringe benefits in wage calculations. The analysis espoused by the Court of Appeals is that if a benefit has economic value to an employee, and

if the value received by the employee is reasonably identifiable and calculable, then it must be included in wage calculations. While the court held that one reasonable method of valuing the benefit to an employee of participation in Taft Hartley trust funds is to use the amount of the employer's contribution to the general fund, its analysis was based upon determining a reasonable calculation of the value of a benefit to the employee.

Once courts break from the notion that the term "wages" is a statutory definition whose only purpose is to define a statutory benefit level, and instead embrace a flexible concept which attempts to identify the value of benefits, then there is no rational differentiation between Taft Hartley fringe benefits and numerous other perquisites which undeniably have value to the employee. This tort approach requires that the several issues of average weekly wages[4], residual wage earning capacity[5], maximum and minimum compensation rates[6] and annual adjustments[7] be examined in light of such other incidental benefits as employer-provided group health policies, employer-provided group term life insurance, medical reimbursement plans, corporate profit-sharing and pension plans, continuing professional educational programs, travel allowance to professional conferences or meetings, disability insurance, employer-provided parking, employer social security contributions, unemployment compensation insurance, individual life insurance and a potential host of less clearly identifiable items determined nevertheless to be of value.

Since workers' compensation insurance itself clearly confers a benefit upon employees, by protecting them against medical expenses and loss of wages for employement injuries even if the injuries are solely their own fault, it is indistinguishable from Taft Hartley fringe benefits. Logically extended, therefore, the tort approach also includes the employer's payment of this premium

[4]33 U.S.C. § 910

[5]33 U.S.C. § 908(c)(21) and (e)

[6]33 U.S.C. § 906

[7]33 U.S.C. § 910(f)

in "wages."[8] This result is obviously absurd and cannot be consistent with the intent of Congress. As the Court of Appeals' analysis cannot logically differentiate between these benefits, and therefore requires inclusion of both, it is evident that the approach itself is faulty.

Once the door is opened such that calculation of wages becomes a subjective attempt to determine the value to an employee of the terms of his employment, including indirect benefits, then the Act passed by Congress will have undergone a basic metamorphosis. The impact of the change in the concept of wages is enormous.

C. The Approach Adopted Below Will Affect the Administration of the Act by Raising Uncertainty in the Determination of Compensation Payments and Will Defeat the Congressional Purpose of the Act.

To apply the Court of Appeals' standard of attempting to determine the real "value" to a claimant of an incidental benefit requires time-consuming analyses which are clearly repugnant to the self-executing purpose of the Act. Actual "value" of wages to an employee can only be measured after taking into account such reductions as state and federal income taxes, social security, plus other payroll deductions. Such an approach has clearly been rejected by Congress. The sheer complexity of shifting to a tort approach to determining compensation benefits is sufficient alone to identify it as a poor route to follow.

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[8]Peculiar ramifications would be felt as a result of this concept. For example, Longshore compensation premiums in New York are already 84% - 87% of payroll, and would rise *above* payroll if fringe benefits were to be included in wages. *See, Wall Street Journal,* May 21, 1981, p. 26; *1981 Senate Hearings,* p. 1176. The spiraling effect of including these premiums themselves in wage calculation would result in injured employees receiving compensation benefits tax free in an amount susbstantially in excess of actual pre-injury reportable *gross* earnings.

Currently, in the vast majority of cases, compensation is voluntarily and automatically paid to the claimant without an award or any litigation. *See,* 33 U.S.C. § 914(a). The adjudicatory process is activated only when a claim is initially controverted or thereafter when voluntary compensation benefits are reduced or terminated. *See, e.g., Prime v. Todd Shipyards Corp.,* 12 BRBS 190 (1980). The first step in the adjudicatory process is the informal conference before a deputy commissioner, who thereafter issues a recommendation. 33 U.S.C. § 919; 20 C.F.R. § 702.311 *et seq.* If either party rejects the recommendation, the case is then set for a formal evidentiary hearing before an administrative law judge. Decisions of administrative law judges are subject to review by the Benefits Review Board whose order may then be appealed to the United States Court of Appeals. 33 U.S.C. § 921.[9]

Absent the injection of a new variable, more than 85% of all lost-time claims were voluntarily and informally resolved without even an informal conference As to those cases which do proceed to litigation, formal hearings are frequently not scheduled for approximately six months, and often decisions are not handed down until three to twelve months thereafter. *1981 Senate Hearings* at 1224. The Director of Workers' Compensation Programs has estimated that cases generally take three to four years to go through the full administrative process. *Id.* at 1164, 1224-1225.

The primary effect of the tort approach to wage calculation on the administrative scheme would be to create uncertainty in an area where a simple, determinate and easily calculable for-

[9]In 1981 there were 61,000 lost-time injuries covered by the Act (excluding the District of Columbia), a figure which the Department of Labor projects will increase. In 1981, while 56,000 lost-time cases were closed (excluding cases under the District of Columbia extension), only 8,300 informal conferences were held. United States Department of Labor, *1983 Budget Justifications of Appropriations Estimates for the Committee on Appropriations* (January 1982), p. ESA – 33. Of 5,538 cases going before administrative law judges, only 2,968 were disposed of. *Id.*, p. DM - 38. The Benefits Review Board's 1981 docket consisted of 1,002 cases. *Id.*, p. DM - 42.

mula is desired. Litigation would likely be fostered concerning the types of benefits to which this approach applies. This is particularly true because there is incentive in the Act to pursue litigation through the entire process since attorneys' fees are assessed against the employer and carrier if counsel is successful in obtaining *any* additional benefits for the worker beyond what has been voluntarily paid. 33 U.S.C. § 928(a)

In addition to questions concerning the type of fringe benefits to be included in wages, uncertainty would also be created as to how the value of those benefits is to be determined. Although the Court of Appeals says that it is "reasonable to measure [the] value by the amount of the employer's contributions," *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 213 (1981), it nowhere says that this is the *only* permissible method of calculation. Further, many benefits are funded not by contributing to a trust fund, but directly by the employer, and valuation of these types of benefits would necessarily be complex.

Given the unsettled legal and factual questions raised by a new concept of wages, it is naive to suppose that employers and carriers would, as in the past, amicably stipulate to average weekly wages and forego the right to present evidence on valuation when a claimant is injecting fringe benefits into his wage calculation. It is equally naive to think that claimants' attorneys, with the incentive of employer-subsidized fees, 33 U.S.C. § 928(a), would accept tendered payments which include less than all "fringe benefits," using the most expansive definition of the word. A greater percentage of cases will almost certainly proceed to the informal conference stage. With the non-binding effect of the Deputy Commissioner's recommendation, it is likely that the bulk of factual issues concerning average weekly wage, now avoided by the certainty of the Act, would require ALJ action, increasing the workload geometrically, and extending the already intolerable delay in the administrative process. Every case raising a new type of benefit, or combination of benefits, or a new method of valuation, would be a case of first

impression, and the party adversely affected would therefore certainly seek review by the Benefits Review Board. Parties dissatisfied with the administrative law judge's factual resolutions would likewise add to the Board's increased caseload, greatly delaying the payment of benefits. An already overburdened and backlogged system will literally grind to a halt under the weight of fringe benefit valuation litigation.

While legal issues concerning what benefits are included in wages and which valuation approaches are permissible may ultimately be resolved through a long series of appellate cases, the factual issues concerning valuation of specific benefits will become a permanent fixture in workers' compensation litigation. Such a result would not be consistent with the Congressional mandate of prompt distribution of benefits.

D. The Tort Approach Defeats the Historical Compromise.

Inclusion of fringe benefits in "wages" deprives both employers and employees of what they bargained for in the compromise which was the foundation of the LHWCA. Employers would lose the lower limits of liability established by the Act. Numerous fears have been expressed that benefit levels are already so high that malingering is encouraged and there is generally no advantage for a worker to return to work. *1981 Senate Hearings,* pp. 41, 315-317, 321-23, 818-20, 822-23. The 66-2/3 benefit levels set in 1927 clearly fail to reflect far different levels of payroll deductions for income taxes and social security in 1982, with the result that currently workers' compensation benefits are not significantly less than a worker's net take-home pay. *1981 Senate Hearings,* pp. 42-43, 731, 821, 823, 973. A single worker in 1982 with income of $26,000.00 per year may already be entitled to receive workers' compensation benefits in an amount greater than his take-home pay net of the deduction for federal and state income taxes and FICA, depending upon the state income tax rate.[10]

[10]For example, assuming a standard deduction, earnings of

If such a worker's average weekly wages were calculated by including fringe benefits of 28% of that amount, he would be entitled to $4,853.33 additional compensation benefits per year, or almost $99.00 *more* per week than he took home when he was working.[11] This is contrary to limited liability bargained for by employers.

Ironically, however, the party damaged the most by this tort approach may be the injured worker himself. It was recognized in recent legislation hearings that the practical effect of higher workers' compensation premiums is to cause less employer funds to be available for actual wages for productive workers. *1981 Senate Hearings,* pp. 25, 246-247, 654, 730, 744, 752, 754, 780, 781, 787, 937, 948, 953, 1071, 1072, 1129. More importantly, however, in attempting to increase the worker's recovery by reinstating tort-style damages, the Court of Appeals has inadvertently but undeniably reinstated the tort-style timetable. Instead of the immediate benefits the claimant bargained for and obtained through the compromise embodied in the Act, a slow litigation process through an overburdened system will be necessary, during which time the claimant may well have no means of support. The Act was designed to avoid just such a result:

> . . . contest and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged.

Norton v. Warner, supra, 321 U.S. at 1569.

$26,000.00 less a personal exemption of $1,000.00 yields taxable income of $25,000.00. Payroll deductions for federal taxes of $5,362.00, District of Columbia income taxes of $1,850.00 and a 6.7% FICA contribution of $1,742.00 results in take home pay of $17,046.00, or 65.6% of gross pay, as compared to potential compensation benefits of $17,333.33 or 66.7% of pay. 26 U.S.C. § 1(c); D. C. Code § 47-1806.3.

[11] See footnote 3. On hypothetical "wages" of $33,280.00 (128% of $26,000.00) the worker would receive annual workers' compensation benefits of $22,186.67, or $5,140.67 more than when he was working.

Rather than discouraging contests and delays, the Court of Appeals approach in this case invites them by fostering uncertainty in the benefit calculation formula. The once easy computation of average weekly wages will become the subject of floods of litigation, the impact of which will be to drown the administrative process and to defeat the very purpose for which the Act was created.

III. THE TORT APPROACH IS CONTRARY TO THE HISTORICAL APPLICATION OF THE ACT WHICH CONGRESS HAS CONSISTENTLY RATIFIED

The statutory provisions defining "wages" and pertaining to determination of average weekly wages were enacted in March, 1927, and have continued in their original form without material amendment. 33 U.S.C. §§ 902(13), 910(a)-(b). Prior to the Court of Appeals' decision below, no reported decision under the Act included fringe benefit contributions in an average weekly wage determination. When previously confronted with the issue, the Benefits Review Board uniformly rejected attempts to include fringe benefit contributions. *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), (*appeal pending in* 5th Cir., Nos. 81-4258 and 81-4273); *Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), (*reversed* in 9th Cir., No. 79-7094; based on D.C. Circuit opinion below); *Lawson v. Atlantic & Gulf Grain Stevedores Co.*, 6 BRBS 770 (1977); *Hilyer v. Morrison Knudsen Construction Co.*, 6 BRBS 754 (1977); *Collins v. Todd Shipyard Corp.*, 5 BRBS 334 (1977).

The Department of Labor, Office of Workers' Compensation Programs ("OWCP"), the Agency charged with administration of the Act, has maintained a consistent administrative interpretation of the Act excluding fringe benefits from average weekly wages. *See,* U.S. Department of Labor, LS/HW Program Memorandum No. 32, June 17, 1968. (Appendix A hereto) Examples of the implementation of average weekly wage calculations excluding fringe benefit contributions are strewn throughout reported case law, giving concrete form to the

historical administrative interpretation. The Court of Appeals' decision below necessarily requires a reversal of 55 years of consistent application of the Act.

In 1972, Congress undertook to substantially amend the Act. The prime focus at that time was benefit levels, particularly the statutory maximum and minimum. *See, Director, OWCP v. Rasmussen,* 440 U.S. 29 (1979). When analyzing the adequacy of maximum and minimum benefits, significant amounts of discussion focused on the prevailing wage rates in the longshore industry. In most cases the wage figures reflected traditional concepts of gross earnings. *Longshoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 before the Select Subcommittee on Labor of the House Committee on Education and Labor,* 92d Congress, 2d Session (*"1972 House Hearings"*) pp. 63, 208-213; *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S.2318, S.528, and S.1547,* 92d Congress, 2d Session (*"1972 Senate Hearings"*) pp. 68, 73, 266-270; *1972 Senate Hearings,* pp. 98-111, 690-694. The AFL-CIO, an amicus curiae on behalf of Respondent Hilyer in this case, at the time of the 1972 Senate Hearings presented wage tables which specifically did not include fringe benefits. *1972 Senate Hearings,* pp. 98-111. Similarly, attorney Joseph Koonz, Jr., a respected claimant's attorney and counsel of record for the AFL-CIO as amicus curiae in this matter, in 1972 referred to wages using a traditional "dollar income" and "salary" approach. *1972 Senate Hearings,* p. 166. The theory that "wages" includes fringe benefits is therefore a new idea, one which neither Congress, nor unions, nor claimant's attorneys had thought of as of the most recent amendments to the Act.

Congress, apparently satisfied with the administrative interpretation of the term "wages," did not seek in 1972 to broaden it, although it clearly could have done so if the administrative

interpretation was not consistent with its intent.[12] Congress clearly never intended for the fringe benefit variable to be injected into the calculation of average weekly wage. No one prior to this case thought "wages" included fringe benefits. 1972 *Senate Hearings*, pp. 98-111, 166. due to the violence that this tort approach inflicts on the administration of the LHWCA, the Court of Appeals must be allowed to legislate a new definition of "wages" into the Act.[13]

IV THE COURT OF APPEALS' APPROACH IN EQUATING FRINGE BENEFITS TO "WAGES" IS OVERLY SIMPLISTIC BECAUSE FRINGE BENEFITS DO NOT FALL NEATLY WITHIN THE STATUTORY FRAMEWORK OF COMPENSABLE BENEFITS

Application to actual situations of the Court of Appeals' tort approach redefining "wages" graphically demonstrates the specter which would haunt the administrative process following adoption of such a concept. While the Court below asserts, without in-depth analysis, that the specific Taft Hartley funds in this case provide value to the employee, and thus satisfy the initial inquiry of the tort approach, a full inquiry into the matter may well require a detailed analysis of the provisions of the benefit plan.[14]

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[12]In 1972, Congress added § 17(b) to the LHWCA, authorizing a lien on compensation benefits in favor of Taft Hartley trust funds in certain circumstances. 33 U.S.C. § 917(b). Congress was therefore mindful of an interplay between fringe benefits and compensation benefits, but nevertheless did not alter the definition of "wages."

[13]The Senate Committee on Labor and Human Resources has proposed that the definition of "wages" in the Act be amended to specifically exclude fringe benefits. *Bill S. 1182*, 97th Congress, 2d Session, § 2(13). The purpose of the change is *"to confirm past practice and Congressional intent and to reaffirm the previously settled rule that fringe benefits are excluded. . ." Longshoremen's and Harbor Workers' Compensation Act Amendments of 1982: Report to Accompany S. 1182*, Senate Committee on Labor and Human Resources, 97th Congress, 2d Session, p. 41.

[14]Although the Employees' Retirement and Income Security Act of 1974 placed certain limitations on permissible plan provisions, there is

For example, with respect to contributions made to a training fund, the fact finder must inquire into whether the fund provides skill improvement training for experienced workers, or merely provides training for apprenticeship, thus having no value to the worker upon whose hours the contribution is calculated.

With respect to welfare plans, a worker only receives value by virtue of his eligibility to participate in the plan. To determine whether an employee has received value, therefore, a fact finder would need to examine whether the worker had attained the minimum age for participation (where applicable) and the required length of service (where applicable). In those welfare plans in which a participant must work a certain number of hours per year to retain eligibility, inquiry must be made into whether that eligibility continues despite the disability. Generally, any contributions made to such a plan above the minimum number of hours necessary for the worker to be eligible for benefits do not enhance the worker's benefits, and are therefore of no "value." A fact finder must therefore determine which contributions have value, and which are excess contributions inuring only to the benefit of the general fund. Pension benefit contributions may likewise be of no value unless the employee is eligible and has at least some vesting credit. Contributions above a certain limit each year in many cases do not operate to increase the ultimate pension.[15]

Once it is determined that a particular contribution is of some value, a fact finder would then confront the even more elusive

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a wide latitude available to plans in areas of eligibility, vesting and benefit levels. *E.g.*, 29 U.S.C. §§ 1053, 1054; 26 U.S.C. § 411.

[15]One does not obtain equity in these funds. Rather one qualifies for standard pension benefits through the eligibility rules of the plan.

issue of how to value the benefit. Although the Court of Appeals seized upon a handy figure to represent one reasonable method of valuation, it did not assert that such a valuation is the only appropriate method. In single employer plans, which provide fringe benefits similarly of "value" to employees, the employer typically funds the plan not with contribution based upon hours, but upon an actuarial determination of the cost of administration of the plan as a whole. In these plans there is no simple or obvious dollar figure which can be plucked from the air to represent the value to the worker. In either hourly contribution fringe benefit plans or employer administered plans there are obviously several different possible approaches to valuation. The Court of Appeals identified cost to the employer. Alternatively, a party may present evidence of the market value of obtaining similar benefits on the open market. The question of whether a comparable insurance policy is sufficiently identical to plan benefits to constitute evidence of value is a factual issue of valuation which poses a difficult question to the fact finder. The employer and the employee will urge upon the fact finder a valuation approach which is most consistent with their respective interests.

Where a contribution is made to a benefit fund which provides some benefits for which the worker is eligible, and other benefits for which he is not, as in the case of a training fund which maintains separate apprenticeship courses and advanced skill improvement courses, the valuation will require either a rational division of the contribution into that portion representing value to the employee and that portion being used only for apprenticeship, or a separate valuation inquiry to analyze the elusive value to the worker of the availability of advanced training facilities. Similarly, where a welfare fund functions through hourly contributions based solely on hours worked, beneficiaries with dependents who share eligibility receive a benefit of substantially greater value than unmarried participants, as a family health policy would have a higher cost or market value than an individual policy. A fact finder would have to resolve these differences.

Inclusion of the value concept in the definition of "wages" therefore raises substantial issues in determining average weekly wages. This approach, however, does not end with that calculation, since in a very high proportion of cases, the value of a fringe benefit, unlike traditional wages, does not cease at the moment a disability starts. In those cases, it would be necessary to conduct a separate inquiry into the residual value to the employee of the fringe benefit in order to avoid a double recovery which might arise if he were to receive both the value of the fringe benefit *and* worker's compensation payments calculated with reference to the fringe benefit. Thus, for example, were a widow to receive not only a lump sum death benefit or proceeds of insurance but also workers' compensation consisting in part of the cost of the policy, she would recover twice. Also, in most health and welfare plans, eligibility once earned is not lost during periods of temporary disability, because the worker has sufficient prior eligibility credit to carry him for substantial periods of time.[16] Frequently the plan provides specifically that the individual is to receive eligibility credit for future periods during periods of disability. In either case, the individual will not lose the value of the benefit of the trust fund. To include that benefit in the average weekly wage calculation would again amount to double recovery.

Likewise, in cases of permanent total disability, a claimant is entitled to disability benefits for the remainder of his life, and to that extent, disability benefits approximate a pension. To permit a claimant to receive both a higher compensation rate due to inclusion of prior pension fringe benefit contributions, and also to receive disability benefits beyond his anticipated retirement date, again would result in double recovery. Similarly, death benefits are payable for the life of the surviving spouse, and to that extent such benefits approximate a joint and survivor annuity pension rather than an income replacement. Again, to

[16]It has been estimated that 95% of compensation injuries are resolved with no permanent effects. *1981 Senate Hearings*, p. 6.

provide for a virtual annuity using a rate calculated at a higher level due to inclusion of pension benefit contributions would be duplicitous.

While the Court of Appeals opinion deals specifically only with Taft Hartley trust funds, its conceptual approach could apply to numerous other fringe benefits, the loss of which does not coincide with the onset of a disability. Thus, for example, employer provided or employer paid parking is of clear and calculable benefit to an employee. Yet when the employee is disabled and therefore not in need of a parking space or reimbursement for parking, he has not lost the value of that fringe benefit. The D.C. Circuit's approach to calculation of average weekly wage, however, could include that benefit as an "identifiable and calculable" valuable element of wages. Likewise, employer purchased disability insurance, employer contributions to Social Security and premiums for workers' compensation coverage all provide a benefit to the employee and relieve him of the need to purchase equivalent private insurance. A disabled employee would receive the proceeds of one or all of these types of insurance during disability. During disability he would not have the hypothetical need to seek these types of disability insurance on his own, and he would in any event be receiving the benefits of them. To provide him with higher workers' compensation benefits is simply to give him a windfall. These illustrations demonstrate that fringe benefits, whether obtained through Taft Hartley trust fund contributions or provided through direct payment from an employer, can be varied and complex and do not fit neatly into the same conceptual niche as traditional wages, which stop at the onset of disability. To require equitable inquiry into the "value" of particular benefits would require careful and complex analyses of a myriad of factual issues contrary to the Act's design of swift and definite administration.

Since the Act defines "wages" in a manner which does not vary with the type of disability, calculation of average weekly wages cannot be self-adjusting to account for situations where

the value of a certain benefit would not be lost during a period of temporary disability but would be lost during a long disability[17] or vice versa. [18] In the frequent situation in which an injured employee has different periods of both temporary and permanent disabilities, in order to account for the fact that the worker has not lost "value" during the periods of disability, separate factual inquiries must be engaged in to determine the worker's wages after the disability.

If participation in a health and welfare plan is "wages" before an injury, then continued participation is certainly "wages" during the various periods after the injury. Computation of the value of a fringe benefit or the continuing residue of the benefit after the injury would be necessary under §§ 8(c)(21) and 8(e) of the Act in appropriate cases of permanent partial or temporary partial disability respectively. 33 U.S.C. §§ 908(c)(21) and 908(e). It is obviously straining the Act to suggest that a comatose injured worker whose eligibility under a health and welfare plan continues is only temporarily partially disabled, but that is precisely the result which follows from inclusion of fringe benefits in wages, since continued eligibility is clearly of value to him, and he would thus be earning "wages" during disability. During the same period of disability, wherein participation in fringe benefit funds start and stop, there may be several different compensation rates due to the differences in residual "wages." Calculation of compensation benefit rates will differ between periods of temporary disability, permanent disability and death benefits depending upon the changing status of participation in fringe benefit plans. Cases will never close since each individual case will require constant monitoring and modification.

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[17] E.g. in the case of a health and welfare plan in which eligibility continues.

[18] E.g., in the case of a pension plan where the employee may lose some eligibility credit in short term disability, but receives workers' compensation benefits in lieu of a pension in permanent disabilities.

The net result of such a suggested change in the Act is to interject a procedural complication which requires a factfinder to engage in valuation of one or more benefits not only in the calculation of wages prior to the injury, but also with respect to wage earning capacity thereafter, each time it may change. While that type of busywork may have the benefit of absorbing the idle hours of the multitude of lawyers entering the practice, the violence it would do to the purpose of the Act is obvious.

CONCLUSION

The purpose of the Act was to provide a rapid and defined statutory remedy to workers injured in industrial accidents. Injection of the tort approach of computing values lost to the employee will destroy the system's ability to accomplish that goal. The decision of the Court of Appeals therefore must be reversed.

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APPENDIX A

COM-P-6
X COM-P-6-8
X COM-P-6-8, Sec. 2(13)
X COM-P-6-8, Sec. 10
X ADM-8-4

U.S. DEPARTMENT OF LABOR
Wage and Labor Standards Administration
Bureau of Employees' Compensation
Washington, D.C. 20211

June 17, 1968

LS/HW PROGRAM MEMORANDUM NO. 32
SUBJECT: Computation of Pay Rates –
Fringe Benefits –
LS/HW Compensation Act - Sections 2 (13) and 10

Quoted below is the Associate Solicitor's advisory opinion of March 18, 1968:

> "You ask whether pensions, dental care, medical care, and other fringe benefit contributions by employers should be included in computing the average weekly wage for computation purposes.
>
> "Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act reads as follows:
>
> > " 'Wages' means that money rate at which the services rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer."

"We feel that it would be improper to assert the inclusion of pension and health plan contributions by the employer

in computing wages though there is support for including such contributions in wages. *United States v. Carter* 353 US 210 (1957) concerned the extent of the liability on a payment bond furnished by a contractor, as required by the Miller Act, for the protection of persons supplying labor for the construction of federal public buildings. The collective bargaining agreement under which the laborers were hired obligated the contractor to pay 7½ cents per hour to the trustees of a health and welfare fund established for the benefit of the laborers. It was expressly stated that the contributions 'shall not constitute or be deemed to be wages' due the employees. The Court stated that 'the parties have stipulated what contributions to the fund were part of the consideration Carter agreed to pay for the services of laborers on his construction jobs. That the unpaid contributions were a part of the compensation for the work to be done by Carter's employees is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter. Not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective bargaining agreements'.

"In *Inland Steel Co., v. NLRB,* 170 F.2d 247 (1948), it was held that pension payments by the employer were wages as well as 'other conditions of employment' within the meaning of the National Labor Relations Act.

"In Senate Report 963, 88th Cong., Second Sess., regarding amendments to the Davis-Bacon Act, at page 3, it was said that 'regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation'.

"Payments to these funds are not only a substitute for direct wage increases which workers would otherwise have received; but, in addition, these payments are now a very large part of the hourly wage costs for the industry. A

typical Longshore agreement reveals a basic wage of $3.50 per hour, and welfare and pension fund contributions of $.83 per hour.

"In *United States v. Embassy Restaurant*, 359 US 29 (1959), the Supreme Court held that contributions by an employer to a union welfare fund which were required by a collective bargaining agreement were not entitled in bankruptcy to priority as being 'wages . . . due to workmen' under the Bankruptcy Act. The contributions were flat sums of $8 per month for such workmen, without relation to their hours, wages, or productivity. Because they were due to trustees not to workmen, the court ruled that these unpaid contributions were not wages due to workmen. A strong dissent was registered. The Longshore Act does not require that the wages be due to the employee; thus mitigating this case as authority for the present situation.

"However, other factors and policy considerations must lead us to the view that we should not include employer contributions to pension funds and for other fringe benefits in computing the average weekly wage rate.

"In determining the wage paid to employees with regard to the Fair Labor Standards Act, which defines wages as including the reasonable cost to the employer of furnishing the employee with food, lodging or other facilities, reference should be made to the letter from the Administrator of May 22, 1967, which says:

> 'As pointed out in section 531.32; other facilities are used in section 3(m) must be something like board and lodging. Contributions to pension plans or group life, disability, or other insurance plans do not constitute the reasonable cost or fair value of facilities furnished which may be credited under section 3(m) of the act toward the applicable minimum wage which section 6 requires to be paid free and clear on the pay day for each workweek'.

"Note however, that the FLSA requires that the wages be paid 'free and clear,' while the Longshore Act does not contain such an express requirement.

"Before 1964, fringe benefit contributions were not part of wages under the Davis-Bacon Act. Since it was generally felt that such contributions should be part of wages, Congress passed an amendment to the Act including them as such.

"In 1927, when the Longshore Act was enacted, one rarely heard of private welfare and pension funds to provide group life insurance, hospital and medical care, and pensions. These fringe benefits developed during World War II and expanded greatly thereafter. Since we feel bound by past practice of excluding these fringe benefit contributions from wages, it is up to Congress to provide a realistic definition of wages which will correspond to current wage customs and practices".

/s/ _____
John J. Newman
Assistant Director, LS/HW

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